

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAN K. FITZGERALD and U.S. POSTAL SERVICE,  
POST OFFICE, Englewood, CO

*Docket No. 98-2007; Submitted on the Record;  
Issued September 13, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied waiver of the overpayment in the amount of \$1,142.66 that occurred in appellant's case; (2) whether the Office properly recovered the overpayment by withholding \$50.00 per month from continuing compensation; and (3) whether the Office properly denied appellant's request for an oral hearing on the overpayment determination.

The Board has duly reviewed the record and finds that the Office properly denied waiver of the overpayment.

On December 4, 1994 appellant, then a 44-year-old city letter carrier, filed a claim for an employment-related emotional condition. On June 9, 1995 the Office accepted her claim for a temporary aggravation of depression and began paying appropriate compensation benefits. On January 7, 1998 the Office issued a preliminary determination that an overpayment of compensation occurred in appellant's case in the amount of \$1,142.66, which resulted because deductions were not made for basic life insurance premiums or optional life insurance retirement premiums for the period September 27, 1996 through November 22, 1997. The Office found that appellant was without fault in the creation of the overpayment, informed her of the right to a prerecoupment hearing and enclosed an overpayment recovery questionnaire for review in determining whether the overpayment should be waived. Appellant completed the questionnaire and requested waiver of the overpayment, but did not request a hearing. In a decision dated April 3, 1998, the Office finalized its preliminary determination and denied waiver of recovery of the overpayment.

By letter dated April 17, 1998, received by the Office's Branch of Hearings and Review on April 27, 1998, appellant requested a hearing regarding the denial of waiver of the recovery of the declared overpayment.

By decision dated May 20, 1998, the Branch denied appellant's request for a hearing following the issuance of a final overpayment decision on the grounds that there is no provision for a hearing in this instance. The Branch explained that the "right to a hearing extends only to the preliminary overpayment finding."

An overpayment of compensation based on underwithholding of health insurance or life insurance is subject to the waiver provisions of 5 U.S.C. § 8129, as well as other statutes and regulations relative to overpayments and collection of debts.<sup>1</sup>

In the present case, the record reveals that appellant was enrolled in basic and optional life insurance programs. The record further reflects that for the period September 27, 1996 through November 22, 1997, deductions for basic and optional life insurance in the amount of \$1,142.66 were not made. Accordingly, the Board finds that the Office properly determined that this resulted in an overpayment in the amount of \$1,142.66, based on the nondeduction of life insurance premiums. Appellant did not contest this finding.

Regarding waiver, section 10.322(a) of Title 20 of the Code of Federal Regulations<sup>2</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

"(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses, and;

"(b) The individual's assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent."<sup>3</sup>

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.<sup>4</sup>

Under the second criterion, an individual's assets include: (a) liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds, certificates of deposit and

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<sup>1</sup> See FECA Bulletin No. 85-31 (issued June 4, 1985); *James Lloyd Otte*, 48 ECAB 334 (1997); *Glen B. Cox*, 42 ECAB 703 (1991).

<sup>2</sup> 20 C.F.R. § 10.322(a).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 2.0200.6(a)(1) (September 1994).

<sup>4</sup> *Id.*

the like and (b) nonliquid assets, such as the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings or supplies therein, any vehicles above the two allowed per immediate family, jewelry and art work. Assets do not include the value of household furnishings in the primary residence, wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile or income-producing property if the income from such property has been included in comparing income and expenses.<sup>5</sup> When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time and a finding that recovery of the overpayment would not defeat the purpose of the Act.<sup>6</sup>

In the instant case, appellant provided an overpayment recovery questionnaire to the Office. Based on the information provided, the Office properly determined that appellant received \$1,794.34 in net compensation per month and reported total monthly expenses of \$1,594.17, for a difference of \$200.15 per month. Therefore, the Office properly determined that appellant did not need substantially all of her current income to meet ordinary expenses and that recovery, therefore, would not defeat the purpose of the Act.

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by the same criteria set forth in section 10.322 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his position for the worse.<sup>7</sup> In this case, appellant has not shown that recovery would "be against equity and good conscience."

The Board further finds that the Office properly determined to recover the overpayment by withholding \$50.00 per month from appellant's continuing compensation benefits.

Section 10.321(a) of the regulations<sup>8</sup> provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual,

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(a)(4) (September 1994).

<sup>6</sup> *Supra* note 3.

<sup>7</sup> 20 C.F.R. § 10.323. In a rare third situation, recovery is considered to be against equity and good conscience when the individual against whom the overpayment is charged derived no personal gain from the incorrect payments and had no knowledge of the compensation benefits that were paid. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (September 1994). In this case, however, the incorrect payments were paid directly to the employee, who thereby derived a personal gain.

<sup>8</sup> 20 C.F.R. § 10.321(a).

and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

In the present case, the Office, in determining the rate of repayment by deduction from appellant’s continuing compensation payments, considered the factors set forth by this section. The Office noted appellant’s financial circumstances as well as the amount by which her income exceeded her debts. The Office’s determination to waive any interest charges and begin recovery of the debt at the rate of \$50.00 every 28 days was also reasonable under the circumstances of this case. The Board, therefore, finds that the Office properly denied waiver of recovery of the overpayment, and properly required repayment at the rate of \$50.00 every 28 days.

The Board also finds that the Office properly denied appellant’s request for a hearing.

Pursuant to *Califano v. Yamasaki*, 422 U.S.C. § 682 (1979), the Office has established procedures for handling overpayment cases under 5 U.S.C. § 8129, pertaining to the recovery of overpayments. The Director of the Office has determined that the holding of the Supreme Court in *Califano v. Yamasaki* is applicable to the recovery of overpayments under the Act and requires an opportunity for a prerecoupment hearing.<sup>9</sup> Accordingly, federal regulations provide that, before adjusting future payments or otherwise seeking to recover an overpayment, the Office shall provide the individual with written notice of, among other things, the individual’s right to request a prerecoupment hearing within 30 days of the date of written notice of the overpayment for the purpose of challenging the fact or amount of the overpayment, the preliminary finding of fault, or for the purpose of requesting waiver.<sup>10</sup> Additional evidence must be submitted, or a prerecoupment hearing requested, within 30 days of the Office’s written notice to the individual. Failure to exercise the right to a prerecoupment hearing within 30 days of the date of notice of overpayment shall constitute a waiver of that right.<sup>11</sup> If additional written evidence is not submitted, or a hearing requested, within the 30-day period, the Office will issue a final decision based on the available evidence and will initiate appropriate collection action.<sup>12</sup>

In the present case, appellant did not request a hearing concerning the Office’s preliminary overpayment determination until after that determination had been finalized. By letter dated April 17, 1998, appellant requested an oral hearing and submitted additional financial information. As appellant’s request for a hearing and additional evidence were not received within 30 days of the Office’s January 7, 1998 preliminary determination of an overpayment of compensation, she waived the right to a hearing and the Office properly denied this request.<sup>13</sup>

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<sup>9</sup> *Fred A. Cooper, Jr.*, 44 ECAB 498 (1993) (noting that the right to a prerecoupment hearing does not arise under the provisions of 5 U.S.C. § 8124(b)).

<sup>10</sup> 20 C.F.R. § 10.321(d)(4).

<sup>11</sup> *Id.* at § 10.321(e).

<sup>12</sup> *Id.* at § 10.321(h).

<sup>13</sup> See generally *Philip G. Feland*, 48 ECAB 485 (1997).

The decisions of the Office of Workers' Compensation Programs dated May 20 and April 3, 1998 are hereby affirmed.

Dated, Washington, D.C.  
September 13, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Valerie D. Evans-Harrell  
Alternate Member